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**Datasheet for the decision
of 26 January 2010**

Case Number: T 1911/07 - 3.5.03

Application Number: 01301976.5

Publication Number: 1134922

IPC: H04J 3/14

Language of the proceedings: EN

Title of invention:

Method and apparatus for signaling path restoration
information in a mesh network

Applicant:

LUCENT TECHNOLOGIES INC.

Headword:

Signaling path restoration/LUCENT

Relevant legal provisions:

EPC Art. 84, 123(2)

Relevant legal provisions (EPC 1973):

-

Keyword:

"Added subject-matter (yes)"

"Clarity (no)"

Decisions cited:

-

Catchword:

-



Case Number: T 1911/07 - 3.5.03

D E C I S I O N
of the Technical Board of Appeal 3.5.03
of 26 January 2010

Appellant: LUCENT TECHNOLOGIES INC.
600 Mountain Avenue
Murray Hill NJ 07974-0636 (US)

Representative: Sarup, David Alexander
Alcatel-Lucent Telecom Limited
Unit 18, Core 3, Workzone
Innova Business Park
Electric Avenue
Enfield EN3 7XU (GB)

Decision under appeal: Decision of the examining division of the
European Patent Office posted 29 June 2007
refusing European application No. 01301976.5
pursuant to Article 97(1) EPC 1973.

Composition of the Board:

Chairman: A. S. Clelland
Members: F. van der Voort
M.-B. Tardo-Dino

Summary of Facts and Submissions

- I. This appeal is against the decision of the examining division refusing European patent application No. 01301976.5 (publ. No. EP 1134922).
- II. In the notice of appeal the appellant requested that the decision be set aside and a patent be granted. With the statement of grounds of appeal the appellant filed claims of a "Primary Request" and claims of an "Auxiliary Request". Arguments in support were also submitted.
- III. In a communication annexed to a summons to oral proceedings the board raised, without prejudice to its final decision, objections under Articles 84 and 123(2) EPC in respect of the claims of both requests on file. Further, the appellant's attention was drawn to Articles 13 and 15(3) RPBA. The appellant was also informed that if amended claims were filed, it would be necessary at the oral proceedings to discuss their admissibility and, if the claims were held admissible, the question of whether or not the claims complied with the requirements of the EPC.
- IV. In response to the board's communication, the appellant filed, with a letter dated 4 January 2010, claims of a first set ("Replacement Claims"), hereinafter referred to as the main request, and a second set ("Auxiliary Replacement Claim Set"), hereinafter referred to as the auxiliary request, and submitted arguments in support of these requests.

- V. With a letter dated 19 January 2010 the appellant informed the board that it would not attend the oral proceedings and requested that they be cancelled and that the procedure be continued in writing.
- VI. In a subsequent communication the board informed the appellant that the request that the oral proceedings be cancelled could not be granted and that the date fixed for the oral proceedings was maintained. Reasons were given.
- VII. Oral proceedings were held on 26 January 2010 in the absence of the appellant.

The board understood the appellant to be implicitly requesting in writing that the impugned decision be set aside and a patent be granted on the basis of the claims of the main request or, failing that, on the basis of the claims of the auxiliary request, both requests as filed with the letter dated 4 January 2010.

At the end of the oral proceedings, after deliberation, the board's decision was announced.

- VIII. The main request includes two independent claims, i.e. method claim 1 and system claim 22. In view of the board's conclusion in respect of claim 22, only claim 22 is reproduced *verbatim* below:

"A system for restoring a service path in a network having at least one non-conforming network element, said service path having a pre-computed restoration path, said pre-computed restoration path having at least one segment, said system characterized

by:

a memory for storing computer-readable code; and
a processor operatively coupled to said memory,
said processor configured to:

detect a failure along said service path; and
signal a restoration of said failure using at
least one signaling path and wherein said at least one
signaling path transits said at least one non-conforming
network element."

Claim 22 of the auxiliary request differs from claim 22
of the main request in that the following feature is
added:

", and wherein said restoration signaling passes
transparently through said at least one non-conforming
network element and wherein said non-conforming network
element is a network element possessing restoration
capabilities that are incompatible with restoration
capabilities of a conforming network element."

Reasons for the Decision

1. *Procedural matters*

- 1.1 The board considered it to be expedient to hold oral proceedings for reasons of procedural economy (Article 116(1) EPC). The appellant, which was duly summoned, had informed the board that it would not attend the oral proceedings and, indeed, was absent. The oral proceedings were therefore held in the absence of the appellant (Rule 115(2) EPC, Article 15(3) RPBA (OJ 11/2007, pages 537 to 547)).

1.2 In the communication accompanying the summons, objections under Articles 84 and 123(2) EPC were raised. The appellant was thereby informed that at the oral proceedings it would be necessary to discuss these objections and, consequently, could reasonably have expected the board to consider at the oral proceedings these objections in respect of the main and auxiliary requests as filed with the letter dated 4 January 2010. In deciding not to attend the oral proceedings the appellant chose not to make use of the opportunity to comment at the oral proceedings on any of the objections but, instead, chose to rely on the arguments as set out in the written submissions, which the board duly considered below.

1.3 In view of the above and for the reasons set out below, the board was in a position to give at the oral proceedings a decision which complied with the requirements of Article 113(1) EPC. The appellant's request that the procedure be continued in writing was therefore not granted.

2. *Main request*

2.1 Independent claim 22 corresponds to claim 23 as filed, in which, however, the following underlined wording of two of the features of the claim is deleted:

i) the processor is configured to detect a restorable failure along the service path; and

ii) the processor is configured to signal the restoration of said failure using at least one signaling

path that occupies the same bandwidth as said pre-computed restoration path, each of said at least one signaling paths being replaced by a segment of said pre-computed restoration path after signaling is complete.

- 2.2 As to feature i), the appellant argued that "the detection of a failure step disclosed in the present disclosure will detect both restorable and non-restorable failures, as would be apparent to a person of ordinary skill in the art, i.e., the detection step is independent of the type of failure (restorable or non-restorable)".

The board notes however that all four independent claims as filed explicitly include a feature relating to the detection and determination of a restorable failure before a restoration of the failure is signalled, see claims 1 and 23 as filed ("detect[ing] a restorable failure") and claims 2 and 24 as filed ("detect[ing] a failure along said service path; determine[determining] if said failure is a restorable failure").

It is also noted that the description as filed is in line with the above-mentioned features of the independent claims as filed. More specifically, it is disclosed that, once a failure is detected, it is determined whether the failure has occurred within or outside a restorable network and, only if the failure is within the restorable network and, hence, can be restored, the step of signalling a restoration is triggered, see, e.g., col. 7, lines 11 to 17, col. 10, lines 31 to 36, col. 11, lines 22 to 27, col. 12, lines 42 to 46, col. 16, lines 25 to 31, col. 18, lines 44 to 48, and col. 20, lines 6 to 9 of the application as published.

Hence, neither the claims as filed nor the above-mentioned passages of the description provide a basis for a detection of a failure without determining that it is a restorable failure. The board cannot find a basis elsewhere in the application as filed. Nor did the appellant refer to any specific parts of the application as filed.

- 2.3 With respect to feature ii) the appellant argued that "the key feature of the cited step is the signaling of the restoration of the failure using at least one signaling path. The requirement that the signaling occupies the same bandwidth as said pre-computed restoration path is part of an exemplary embodiment, but is not required to accomplish the cited second step, as would be apparent to a person of ordinary skill in the art."

In the board's view, the questions of whether or not the signaling of the restoration of the failure using at least one signaling path is the key feature and whether or not it would be apparent to a skilled person that the signaling need not occupy the same bandwidth as the pre-computed restoration path, are not relevant. Decisive is rather whether or not there is a basis in the application as filed for deleting the underlined wording of the feature (see point 2.1 above, feature ii)). If there is no basis, the claim includes subject-matter which extends beyond the content of the application as filed.

The board notes that all four independent claims as filed include a feature concerning the bandwidth occupied by the signalling in relation to the pre-computed restoration path, see claims 1 and 23 as filed ("at least one signaling path that occupies the same bandwidth as said pre-computed restoration path") and claims 2 and 24 as

filed ("at least one signaling path that follows said pre-computed restoration path"), and that the description is in line with the claims, see col. 8, lines 43 to 52, col. 13, lines 11 to 14, col. 15, lines 16 to 35, and col. 18, lines 5 to 9, 13 to 20 and 48 to 52. The board cannot find a basis for the deletion of the above-mentioned wording in feature ii) elsewhere in the application as filed. Nor did the appellant refer to any specific parts of the application as filed.

2.4 The appellant's arguments are therefore not convincing and the board concludes that claim 22 of the main request does not comply with the requirements of Article 123(2) EPC.

2.5 Further, claim 22 does not meet the requirements of Article 84 EPC, since the term "non-conforming network element" does not have a well-recognised meaning within the art of communication networks. In the absence of a definition in the claim of those criteria a network element must comply with in order to qualify as a "non-conforming network element", the claim is therefore unclear.

2.6 The appellant did not argue that the term had a well-recognised meaning within the art of communication networks, but argued rather that in a dictionary the term "conforming" was defined as "to act or be in accord or agreement" and that therefore the term "non-conforming" meant "to not act in accord or in agreement". In the board's view, however, even if "non-conforming" is understood as "not acting in accord or agreement", this does not imply any criteria on the basis of which it is clear whether or not a network element as referred to in the claim is "non-conforming".

2.7 The board therefore concludes that claim 22 of the main request does not comply with the requirements of Article 84 EPC.

2.8 Since claim 22 of the main request does not meet the requirements of Articles 84 and 123(2) EPC, the main request is not allowable.

3. *Auxiliary request*

3.1 The appellant argued that support for the added feature in claim 22 of the auxiliary request (see point VIII) could be found at pages 8 and 9 of the application as filed, i.e. col. 6, line 7 to col. 7, line 36 of the application as published.

The board notes however that according to the above-cited passage of the description, a non-conforming network element includes a network element which does not provide any restoration capabilities, see col. 6, lines 27 to 34 ("varying restoration capabilities, if any"), whereas according to the added feature, a non-conforming element is a network element which possesses restoration capabilities which are incompatible with restoration capabilities of a conforming network element. The latter definition thus excludes network elements without any restoration capabilities and is therefore more specific. The board could not however find a basis for this definition of a non-conforming element in the application as filed. The added feature thus contravenes Article 123(2) EPC. It also gives rise to an inconsistency between the description and the claim as to the definition of a non-conforming element, which makes the claim unclear in that

it is unclear for which matter protection is sought, thereby contravening Article 84 EPC.

3.2 Further, the reasons given at points 2.1 - 2.3 in respect of objections to claim 22 of the main request in connection with the requirement of Article 123(2) EPC apply *mutatis mutandis* to claim 22 of the auxiliary request, since the added feature relates to the non-conforming network element (see point VIII above) and is not concerned with the deleted wording as referred to at points 2.1 - 2.3, which relates to the detection and determination of a restorable failure and the bandwidth occupied by the signaling path. The above-mentioned objections have therefore not been overcome.

3.3 For the above reasons claim 22 of the auxiliary request does not meet the requirements of Articles 84 and 123(2) EPC and, consequently, the auxiliary request is not allowable.

4. There being no allowable request, it follows that the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

D. Magliano

A. S. Clelland